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SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Petitioners,

vs.

WILLIAM LEE THOMPSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court has miscontrued the decision in Hitchcock v. Dugger, 95 L.Ed.2d 347 (1987), in failing to acknowledge and consider the applicability of Chapman v. California, 386 U.S. 18 (1967), as specifically stated in Hitchcock, to similarly postured cases, and therefore summary reversal for consideration by the Florida Supreme Court should obtain?

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
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State of Florida,

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vs.

WILLIAM LEE THOMPSON,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

The petitioners, Richard L. Dugger and Robert A. Butterworth, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Florida Supreme Court entered in **Thompson v. Dugger**, September 9, 1987, rehearing denied December 7, 1987, and a summary reversal obtain instructing the Florida Supreme Court to

review the instant case in light of this court's recognition of the harmless error doctrine as enunciated in **Hitchcock v. Dugger**, 107 S.Ct. 1821 (1987).

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at _____ So.2d _____ (Fla. 1987), 12 F.L.W. 469, decided September 9, 1987, and is reprinted in the appendix hereto, pages A-41-52. Rehearing was denied by order dated December 7, 1987, and is not yet reported. It is reprinted in the appendix hereto, pages A-53-54.

The decision of the Court of Appeals, Eleventh Circuit, in **Thompson v. Wainwright**, is reported at 787 F.2d 1447 (11th Cir. 1986), and is reprinted in the appendix hereto, pages A-55-124.

The decision of the Florida Supreme Court on direct appeal, upholding the judgment and sentence, is reported in **Thompson v. State**, 389 So.2d 197 (Fla. 1980).

JURISDICTION

The decision of the Florida Supreme Court was entered on September 9, 1987. Rehearing was denied December 6, 1987. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides, inter alia, that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

> they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment X provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

William Lee Thompson pled guilty in June, 1976, of the first degree murder of Sally Ivester. The trial court imposed the death sentence for said crime on June 15, 1976. On direct appeal, the Florida Supreme Court reversed that judgment and

sentence, and remanded the cause with instructions to grant Thompson's motion for withdrawal of the guilty plea. **Thompson v. State,** 351 So.2d 701 (Fla. 1977). On September 18, 1977, William Lee Thompson entered his second guilty plea to the first degree murder of Sally Ivester. The trial court accepted the plea and convened an advisory jury for the purpose of determining the appropriate sentence to be imposed. Following the penalty phase procedures, the jury recommended the imposition of the death sentence. On September 20, 1977, the trial court sentenced Thompson to death for the murder of Sally Ivester, and imposed two life sentences to run concurrently for the guilty pleas of kidnapping and involuntary sexual battery of Miss Sally Ivester. The Florida Supreme Court affirmed

the plea and imposition of death penalty in **Thompson v. State**, 389 So.2d 197 (Fla. 1980)[1]

The path of litigation taken in this case was summarized in detail in **Thompson v. Dugger**, _____ So.2d _____, (Fla. 1987), 12 F.L.W. 469, appendix page A-41. Therein, the Florida Supreme Court provided:

> William Lee Thompson appeals the denial of his Florida Rules of Criminal Procedure 3.850 motion to vacate judgment and sentence of death. He also petitions this Court for a writ of habeas corpus and a stay of execution from his second death warrant. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We conclude that the recent United States Supreme Court decision in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), requires this

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[1] The particular facts of the crime were originally reported in great detail in **Thompson v. State**, 389 So.2d 197 (Fla. 1980). They were repeated most recently in **Thompson v. Wainwright**, 787 F.2d 1447 (11th Cir. 1986), found in appendix pages A-55-124.

Court to reverse the denial of his 3.850 motion and remand this cause for new sentencing proceedings. In light of our ruling on Thompson's 3.850 motion, the petition for habeas corpus is moot. We continue the stay of execution previously entered.

This is Thompson's fourth appearance before us. . . .

* * *

We address Thompson's claim in the present rule 3.850 post-conviction proceeding that involves the failure of the sentencing judge to allow presentation and jury consideration of nonstatutory mitigating circumstances in the sentencing phase. It directly concerns the principles of law set forth by the United States Supreme Court in its recent decision in Hitchcock v. Dugger. The Supreme Court had granted certiorari to determine whether Hitchcock was correct in contending that his sentence of death under a Florida statute was inconsistent with the requirement that any relevant mitigating evidence may be considered. The United States Supreme Court's unanimous opinion noted that "other Florida judges conducting sentencing proceedings during roughly the same period believed

that Florida law precluded consideration of nonstatutory mitigating circumstances." Id. at 1823. As in the instant case, the trial judge in Hitchcock instructed the jury on the statutory mitigating circumstances, without mentioning nonstatutory evidence of mitigation that had been introduced. The Supreme Court concluded "that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, Eddings v. Oklahoma, and Lockett v. Ohio." Id. at 1824 (citations omitted). The Court concluded that, in light of the fact that no showing of harmless error was made, the exclusion of the nonstatutory mitigating evidence rendered the death sentence invalid. We note that Hitchcock did present some nonstatutory mitigating evidence to the jury and defense counsel commented on it in closing argument.

* * *

Thompson's sentencing occurred in September of 1978. The United States Supreme Court, in June of 1978, had released Lockett v. Ohio, 438 U.S.

586 (1978), which held unconstitutional Ohio's capital sentencing statute limiting mitigating circumstnaces to those enumerated in the statute itself. In December of that year, three months after Thompson's sentencing, this Court directly addressed the issue in Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), construing our statute as allowing nonstatutory mitigating circumstances to be considered by both the jury and the judge in the sentencing proceeding. We subsequently held in Harvard v. State, 486 So.2d 536 (Fla.), cert. denied, 107 S. Ct. 215 (1986), that "an appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute in determining whether to impose a sentence of death or life imprisonment without parole for twenty-five years." Id. at 539.

Our review of the trial court record in the instant cause reveals, first, that the state, in its closing arguments to the advisory sentencing jury listed the statutory mitigating circumstances as those which

> the jury could consider in its deliberations. Second, Mr. Thompson's defense counsel, in his closing arguments, attempted to advise the jury that, although the statute limited aggravating circumstances to those explicitly set out, it did not so limit the mitigating circumstances. The state objected to this statement and the trial court sustained the objection. The trial judge instructed the jury as to mitigating circumstances in the same manner as the trial judge did in Hitchcock. **Under these circumstances, we have no alternative but to conclude Mr. Thompson's death sentence was imposed in violation of Lockett, and in violation of the United States Supreme Court's Hitchcock decision. We find he is entitled to a new sentencing hearing.** . . .

12 F.L.W. at 469, 470 (Emphasis Added)

The Florida Supreme Court in its opinion of September 9, 1987, at 12 F.L.W. 469, neither acknowledges nor entertains a harmless error analysis of this **Lockett** violation, nor does the court visit a harmless error analysis in denying rehearing on December 7, 1987, appendix pages A-53-54.

Both opinions resulted in the face of unchallenged conclusions by the Eleventh Circuit Court of Appeals in **Thompson v. Wainwright**, 787 F.2d at 1457-1458, that under no set of mitigating circumstances would the jury or judge have recommended or sentenced Thompson to life. The Eleventh Circuit, speaking through Circuit Judge Kravitch in addressing the **Hitchcock** issue, and reviewing the facts of the case as they relate to the restricted, nonstatutory mitigating evidence, opined:

> . . .We conclude, therefore that Thompson has not shown any excluded evidence that could have affected the sentence. The testimony introduced at the sentencing hearing indicated that at the time of the crime, Thompson was well able to communicate, and that he and Surace concocted an alibi story. Accordingly, we find that additional evidence regarding intoxication would have been cumulative and would not have made a difference to the sentencing jury.

> In sum, with respect to nonstatutory mitigating circumstances, we conclude that **Thompson did not proffer any significant nonstatutory mitigating circumstances either at sentencing or at the district court's evidentiary hearing, and that his claim must therefore be denied.**

787 F.2d at 1457. (Emphasis added)

REASONS FOR GRANTING THE WRIT

I.

THE FLORIDA SUPREME COURT HAS MISCONSTRUED THE DECISION IN **HITCHCOCK V. DUGGER**, 95 L.ED.2D 347 (1987), IN FAILING TO ACKNOWLEDGE AND CONSIDER THE APPLICABILITY OF **CHAPMAN V. CALIFORNIA**, 386 U.S. 18 (1967), AS SPECIFICALLY STATED IN **HITCHCOCK**, TO SIMILARLY POSTURED CASES, AND THEREFORE SUMMARY REVERSAL FOR CONSIDERATION BY THE FLORIDA SUPREME COURT SHOULD OBTAIN.

The Florida Supreme Court blinded by the unanimity of **Hitchcock v. Dugger**, supra,

abrogated its duty to review the instant case in light of a harmless error analysis.[2]

This court readily acknowledged the plausibility of the harmless error analysis in a **Hitchcock** violation. In the instant case, petitioner has not questioned whether the Florida Supreme Court properly concluded a **Lockett/Hitchcock** violation occurred, rather it is contended that, oblivious to the suggestion that a harmless error argument might have prevailed in **Hitchcock**,

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[2] See **Hitchcock v. Dugger**, 95 L.Ed.at 353, and **§59.041, F.S., "Harmless error; effect.**--No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper administration or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice. . . ."

the Florida Supreme Court has read **Hitchcock v. Dugger**, to require reversal regardless of the case history or circumstances of the crime. This unwillingness to consider harmless error in the instant case mandates reversal and remand to the Florida Supreme Court for further consideration of the facts in light of a **Chapman v. California, supra**, analysis. See **Pope v. Illinois**, 95 L.Ed.2d 439 (1987) [constitutional error, but harmless, in instructions regarding state community standards in consideration of the value question], **Rose v. Clark**, 92 L.Ed.2d 460 (1986) [impermissible shifting of the burden of proof on an element of the crime in violation of **Sandstrom v. Montana**, 442 U.S. 510 (1979), found to be constitutional error, but harmless error based on the overwhelming evidence of guilt.] In **Pope v. Illinois**, 95 L.Ed.2d at 446, the court explained that "in the absence

of error that renders a trial fundamentally unfair, such as denial of a right to counsel or trial before a financially interested judge, **a conviction should be affirmed** 'where a reviewing court can find that the record developed at trial established guilt beyond a reasonable doubt. . . .' **Id**, at _____, 92 L.Ed. 2d 460, 106 S.Ct. 1301."

While necessarily a constitutional violation to restrict consideration of nonstatutory mitigating evidence, **Lockett v. Ohio**, 438 U.S. 586 (1978); **Skipper v. South Carolina**, 476 U.S. _____, 90 L.Ed.2d 1 (1986), and **Eddings v. Oklahoma**, 455 U.S. 104 (1982), said violation does not constitute fundamental error. See: **Penry v. Lynaugh**, 832 F.2d 915 (5th Cir. 1987), and **Clark v. Dugger**, _____ F.2d _____ (decided December 15, 1987, 11th Cir., slip opinion p. 1112). (**Hitchcock** error evident, however harmless error applied.)

In failing to apply a harmless error analysis herein, the Florida Supreme Court has misconstrued **Hitchcock v. Dugger** to mean that a **Lockett** violation is fundamental error, requiring automatic reversal.[3]

A panel of the Eleventh Circuit Court of Appeal, after reviewing the grizzly and torturous death of Sally Ivester at the hands of Thompson and his co-defendant, Rocco Surace, concluded that although Thompson's trial counsel "failed to conduct any investigation of Thompson's background" which fell outside the scope of reasonably

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[3] **Morgan v. State**, ____ So.2d ____ (Fla. Aug. 27, 1987, 12 F.L.W. 433; **Downs v. Dugger**, ____ So.2d ____ (Fla. Sept. 9, 1987), 12 F.L.W. 473; **Riley v. Wainwright**, ____ So.2d ____ (Fla. Sept. 3, 1987), 12 F.L.W. 457; **Foster v. Dugger**, ____ So.2d ____ ()Fla. Dec. 3, 1987), 12 F.L.W. 598; But see **Delap v. Dugger**, ____ So.2d ____ (Fla. 1987), 12 F.L.W. 517; and **Demps v. Dugger**, ____ So.2d ____ (Fla. 1987), 12 F.L.W. 547.

professional assistance, relief would not obtain. The court stated:

> Even had the jury heard this evidence, however, we are confident that Thompson's sentence would have been the same. The jury's determination was strongly supported by the aggravating circumstances introduced in the record. Nothing Soloman [defense counsel] could have presented would have rebutted the testimony concerning Thompson's participation in the brutal torture murder. The testimony indicated that although Surace initiated the beatings, Thompson took over, beating the victim with a chain, his fists, a chair leg, and a billy club. The testimony also indicated that it was Thompson who actually raped the victim with a chair leg and billy club. After hearing testimony that Thompson committed these atrocities, the jury heard nothing from Thompson himself in reply. As noted above, Thompson, and not Soloman, was responsible for his failure to testify. We do not believe that there is a reasonable probability that evidence of a difficult youth, an unsavory co-defendant, and a limited mental capacity would have altered this jury's decision.

> Furthermore, the evidence offered in the district court would not be particularly persuasive even had the crime been less egregious. Barbara Savage testified at the trial as to Surace's connection with motorcycle gangs and that Thompson was following Surace's lead throughout the incident, and Soloman argued this point to the jury. With respect to Thompson's mental condition, which was not touched upon at the sentencing hearing, although the psychiatric report suggested a personality disorder, and the school records indicated low intelligence, none of the material indicated that Thompson was suffering any specific disturbance at the time of the crime which would have mitigated his participation. Finally, although Thompson's difficulties in his early years were ignored at the sentencing hearing, he has produced no witnesses, and we doubt that the jury would have found mere copies of school records particularly pursuasive.

747 F.2d at 1453-1454. See also: **Francois v. Wainwright**, 763 F.2d 1188 (11th Cir. 1985).

Based on this accounting, it cannot be reasonably assumed that the **Lockett/Hitchcock** error was so egregious as to totally eliminate the possibility of the harmless error analysis. The only answer can be that the Florida Supreme Court totally misconstrued the case-by-case principal for which **Hitchcock** stands. Reversal is mandated in order to allow the Florida Supreme Court to assess the harmless error doctrine in light of the facts as herein set forth.

CONCLUSION

For these various reasons, the petition for writ of certiorari should be granted and the case reversed and remanded to the Florida Supreme Court for further analysis in light of **Hitchcock v. Dugger**, and **Chapman v. California**, supra.

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APPENDIX

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

CASE NO: 76-3350 B

THE STATE OF FLORIDA,)

Plaintiff,)

vs.)

WILLIAM THOMPSON,)

Defendant.)

_____)

The above-entitled cause came on for sentencing hearing before the Honorable John A. Tanksley, Judge of the above-styled Court, at the Metropolitan Justice Building, 1351 Northwest 12th Street, Miami, Florida, on Wednesday, September 20, 1978, at 8:00 o'clock a.m., pursuant to adjournment.

* * * *

MR. McHALE: Thank you, Your Honor. May it please the Court, ladies and gentlemen, you heard a tape recording played yesterday in which this defendant called the North Miami Beach Police Department and said someone just did a number on his old lady. I have never heard an understatement to that effect in my entire life, and I don't think that you have.

There are lots of reasons to kill someone in our society. It is done for money. It is done for hatred. It is done for love. And sometimes to achieve power. But to call this crime murder is, again, an incredible understatement, because it is not murder. What occurred in that motel room was a perverted type of human sacrifice that only the mind of this defendant can understand completely.

She was not murdered. She was tortured. She was terrorized, and she was humiliated, and for anyone to consider this a murder or a homicide is to have no understanding, whatsoever, of what this case is all about.

My great fear is that after the long day we put in yesterday, and the rapidity that we went through it, that you do not

understand what happened in that motel room.

His Honor will instruct you on the law which must be the basis for your decision, and I believe he'll tell you that it is your duty to follow the law which will be given to you by the Court, and to render him an advisory sentence based upon your determination of whether there is sufficient aggravating circumstances which existed to justify the imposition of the death penalty; and, on the other hand, whether there are sufficient mitigating circumstances which outweigh the aggravation, which will justify a recommendation of life imprisonment.

Your verdict, I believe he'll tell you, must be based on the evidence in this case and the law that he gives you. The aggravating circumstances which you may consider are eight in number, and you'll see that there are a wide variety, not all of them will cover one crime, but they will cover a number of different types of crimes.

The first thing he'll tell you is an aggravating circumstance is that the crime was committed while the defendant was sentenced under a sentence of

imprisonment. It is not the case here. William Thompson was a free man when he committed these acts with his own free will.

The second aggravating circumstance is that at the time of the crime for which he is to be sentenced, the defendant had previously been convicted of another capital offense or another offense involving the use, or threat of use, of violence to another person. There has been no testimony, and the defendant has not been previously convicted of a capital crime or of a crime involving violence to another person. That aggravating circumstance does not exist here.

The third aggravating circumstance is that the defendant, in committing the crime for which he is charged, knowingly created a great risk to a great number of persons. You can see, in a bombing type of situation, that that would be an aggravating circumstance, but in this case, it doesn't apply.

The fourth aggravating circumstance which you'll hear is that the crime for which the defendant is to be sentenced was committed while the defendant was engaged in or was an accomplice

in the commission of or the attempt to commit any robbery, arson, burglary, involuntary sexual battery, kidnapping, aircraft piracy, or the unlawful throwing or discharging of a destructive device. By an Indictment returned by the Grand Jury, the defendant was charged with first-degree murder, kidnapping and involuntary sexual battery. Two of the crimes which are mentioned in that aggravating circumstance have been committed. It was not necessary for the purpose of this proceeding to go into all the elements of involuntary sexual battery and kidnapping, but you know that this defendant has pled guilty to these crimes, and they are an aggravating circumstance, twice -- involuntary sexual battery and kidnapping. You should consider those in your sentence and recommendation to this Court.

It is a most aggravating circumstance, the fifth aggravating circumstance, that the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. It involves a different type of situation. It is not applicable in this case.

The next one is that the crime for which the defendant is to be sentenced was committed for pecuniary gain, and you heard again and again the reason why this girl was beaten was for money.

Number two aggravating circumstance, done for money, but it was done for another reason, ladies and gentlemen, because of the wickedness that was in his mind, as well as the other individual -- perversion -- as I say to you, only the type that he can understand.

The next aggravating circumstance is that the crime was committed in order to disrupt or hinder the lawful execution of government. Obviously, it is not that type of a crime.

The last aggravating circumstance which the Court will instruct you on is that this crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. Do you think that that applies in this case? Aggravating circumstance number three.

His Honor will instruct you as to what those words mean. Heinous means extremely wicked or shockingly evil. Extremely wicked or shockingly evil. It is an understatement.

Atrocious means outrageously wicked and vile. It is an understatement.

Cruel means designed to inflict a high degree of pain. Utter indifference to or enjoyment of the suffering of others and pitiless. It is an understatement, ladies and gentlemen.

You heard from Dr. Lardizabal who told you that the kind of pain that was experienced was the severest kind of pain that can be experienced by a human being. The severest type. In fact, one of the reasons that she died was because of shock -- pain-shock. It caused her heart to stop beating, the pain was so great. Eighty percent of her body was covered with trauma, and there is some pictures admitted in evidence -- you are not able to see every angle and every side -- but Dr. Lardizabal, who performed the autopsy, told you that eighty percent of her body was covered with trauma.

What type of trauma? Black and blue down each arm, from the head -- he said from the head to the feet, she was covered with trauma, but not only beatings. There were burns on her nipples. Her vaginal area was burned. Her teeth were knocked

out. Lacerations about the head. Her buttocks and part of her back were black.

She was beaten so much -- chain marks on her torso. You heard Det. Ojeda. They were a foot long -- chain marks. Her vagina was punctured, as you recall last night, by a blow of the severest force from a blunt object, of severe force designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of the others, pitiless.

I hope that you understand, in this brief proceeding -- I hope and pray that you understand what happened that afternoon when that girl was mercilessly tortured and terrorized for over two hours.

The Court will instruct you as to mitigating circumstances, and I would point out to you, at this very moment, that there is no evidence of any mitigating circumstances. I believe His Honor will tell you that the mitigating circumstances you should consider, if established by the evidence, if established by the evidence are these: first, that the defendant has no significant history of prior criminal activity. I mentioned an aggravating circumstance, a

minute ago, being proof that the defendant has at another time been convicted of a crime involving the use or threat of violence to another person. Don't confuse the absence of that aggravating circumstance with the existence of a mitigating circumstance, that the defendant has no significant history of prior criminal activity.

Those are two different things, and there is no evidence that this is a mitigating circumstance which exists, and it is wrong for you to consider it as existing.

The second mitigating circumstance is that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance. There is no question whatsoever about that. He has entered a plea of guilty. There is no evidence whatsoever of mental disturbance, although, obviously, the acts that he committed are incomprehensible to decent human beings, but don't confuse it with this, because it is a legal term, and there is no evidence whatsoever to establish it.

The third mitigating circumstance is that the victim was a participant in the defendant's conduct or consented to the act. I won't even speak about it.

The fourth mitigating circumstance, again, none of these have been established by any testimony, that the defendant was an accomplice in the offense, and that the participation was relatively minor.

The next mitigating circumstance is that the defendant acted under extreme duress or substantial domination of another person.

While Mr. Solomon took care to ask Barbara Savage Garritz if Rocky was the leader, and he was, but she told you that no one made him put the chair leg in the vagina or the billy club. No one made him beat her. No one made hm burn her, and all the other incredible, shocking acts that she described. This does not exist.

The next one is that the capacity of the defendant to appreciate the wrongfulness of his act was substantially impaired. Again, he has entered his plea of guilty. There is no evidence as to any type of men-

tal aberration and insanity. You cannot consider it.

Finally, that the age of the defendant at the time of the crime -- a mitigating circumstance is that the age of the defendant at the time of the crime -- he is a 24-year-old individual. He is not a child. He is not a juvenile. He is an adult, and it is not a mitigating circumstance.

His Honor will tell you that aggravating circumstances must be established beyond a reasonable doubt. They have been established not only beyond a reasonable doubt, but beyond any and all doubt, beyond a shadow of a doubt, each and every one of the things that the witnesses told you about. Mr. Solomon admitted them. He cross-examined no one. There is no question about it.

His Honor, I believe, will continue and tell you that your verdict must be based upon findings of whether sufficient aggravating circumstances exist. Three of them exist. Three of them, and whether mitigating circumstances outweigh any aggravating circumstances -- there are no mitigating circumstances in this case, ladies and gentlemen. There are none.

Based on these considerations, based on these circumstances, you should advise the Court as to the sentence.

Mr. Solomon will have an opportunity to address you after I conclude my remarks. I am sure he is going to tell you that the sentence of life imprisonment is a terrifying sentence, but I want you to remember that the sentence of life imprisonment means that there will be eligibility for parole at the end of the 25 years. So, when William Thompson is a 49-year-old man, he will be a free man. I ask you to consider that when you consider the aggravating circumstances. 49 years old.

In considering the sentence which you advise the Court, I ask you to consider what happened in the motel room and consider the actions of this defendant when he walked into the bedroom and told Barbara Savage Garritz, "I'm so mad I could kill her." Well, he did just that, but he didn't kill her. He tortured her, terrorized her, humiliated that woman. Chain beatings. First Rocco Surace and then from him. Chain beatings.

He took this chair and broke it stomping on it and took the chair leg and rammed it into her vagina and then twisted it and kicked it with such force that it flew out of her vagina and then he got back and put it in again. After that, he wasn't finished, because he used it to beat her with it. Eighty percent of her body was beaten.

Then, he hit it with the palm of his hand, the second time it was in. It was forced with the force that Barbara Garritz characterized as hard force, and the doctor, Dr. Lardizabal, told you it was severe force.

After that, he takes his fist and hits her in the mouth, knocking out her two front teeth. Billy club comes next. It is rammed again into her vagina. The chair leg is not enough in this case. It is not enough for Mr. Thompson.

Then he hits that. Then he beats her with that, and while the billy club is in her vagina, he takes a lighter. First he has the red one, but then the flame isn't high enough, so he has to find another lighter and burn her.

Remember that all during this time, Rocco Surace has told her

that he would kill her if she screamed, and he had a foot on her throat during these times when these objects were being put in her vagina from Rocky Surace's statement, but it is not enough, because more beatings are called for, and she's beat with the billy club, and she's beat, again, with the chain.

But, there is a reason for this incredible perversion, and the reason is money. One time did they take any care of her, and it was not out of any human concern. It was for one reason, to clean her up so she would walk outside without attracting so much attention, to go to the phone booth. They got the hydrogen peroxide so they could cleanse off her wounds, her blood, and Barbara Garritz combed her hair, brushed her hair back. William Thompson walked her to the phone booth so she could get money for them, and Mrs. Ivester told you what the conversation was.

"You have got to send that money." Det. Ojeda told you that in William Thompson's statement to him he told him his reasons for the beatings was because he wanted to get the money. Barbara Garritz told you earlier that William Thompson

told the victim to have the money wired down in his name -- his name.

It was not enough for William Thompson to beat her, to put these objects in her vagina. it was not enough. Physical humiliation was not enough. Mental humiliation had to follow. "Eat the tampax." "Lick up the beer," off the floor, like a dog.

"Don't get water for her. She's going to have to get it for herself."

"You got blood on me. Take that." "You got blood on my feet. Take that."

Don't stop with physical torture and terrorization, but continue on to mentally humiliate her. It was pure, living hell. For money and for perversion, coupled with sexual battery and kidnapping.

Ladies and gentlemen, Mr. Solomon has an opportunity to address you at this time, but I hope and I pray that you will, under your obligation as jurors in this case, and you have taken the sworn oath to return a recommendation of sentence to this Court based upon the evidence and based upon the law, you --

you, as jurors, have the very special responsibility in this case because you have an opportunity to tell Judge Tanksley what you, as representatives of this community, think life should be like in this community. You have an opportunity to tell him, to tell him and to tell William Thompson that when you commit this act of savage brutality and viciousness, you forfeit your life under the law.

I urge you to do that. I urge you to make your decision not from your hearts and not from your emotions, but from your head. It must be a decision based on the evidence and based on the law, and, ladies and gentlemen, I say to you on behalf of every member of this community that as its representatives you have a solemn responsibility and obligation. It is one you cannot shirk and one which you cannot delay. You have an obligation under the evidence in this case, and under the law which the Court will instruct you, to do one and only one thing, to advise Judge Tanksley that there is only one just sentence in this case and that is the sentence of death for William Thompson. I urge you to do your duty, ladies and gentlemen.

THE COURT: Mr. Solomon.

MR. SOLOMON: Your Honor, members of the jury: what I said to you yesterday was right. I asked you a key question, didn't I? Can you leave your minds open even if you hear horrendous evidence? Can you keep your minds open and not put in there the old Biblical term, "An eye for an eye and a tooth for a tooth," before you hear it all.

You know something here -- do you know that the Court-appointed lawyer, me, is the only person in this room with William Thompson? There is no mother. There is no father. There are no cousins or aunts or uncles or pastors. This man is an absolute total loser, and we might shrug our shoulders and say, "Well, after all, look what he did to this poor girl. Let's do it to him."

Is there one shred -- is there some evidence to back up the law the Judge is going to read to you? Is there some evidence that you could consider that might say, "Let us give him 25 years in prison."

He'll come out 49 years of age, if he comes out at that time. If some future parole commission

reads all of the evidence that you heard, seeing everything in this case and lets him out -- I doubt it.

When he made the decision to ask for mercy by pleading guilty --

MR. McHALE: I must object. That is not part of the evidence and it is not part of the law as to sentencing.

THE COURT: It is argument. Overruled.

MR. SOLOMON: Thank you.

The facts of life are that you ask a jury, when you plead guilty, to please consider mercy. Obviously, things pop into your mind. We're not children here. Mercy. How do you show this girl mercy?

There was no mercy shown this girl.

Again, I come back to that question I asked you: can you take an eye for an eye and a tooth for a tooth and set it aside and accept what you hear.

Now, pecuniary gain? Well, maybe not so. What we're talking about there in that statute is robbery, the 7-11 killings -- they will go in,

take twelve dollars and shoot him dead. Pecuniary gain? That is not what that statute read for, but it was a heinous crime. There is no question about it, not at all.

So, the question is, then, what thread is there upon which he hangs? What did he do and what occurrences happened to, say, well, let's put him in prison for 25 years and hopefully, some parole commission, after that, when they read through all this -- they will not -- don't underestimate the power of a Rocco Surace. He is it. He did it. He did it with him. He followed him. Rocco Surace terrorized not just the poor girl that died, but terrorized two other people. He terrorized them. Yes, he did. He was the leader; I bet he was.

Rocco Surace says, "Take this chain. She's your old lady. Do it to her," and he picked up on the theme and he started in. God forbid, it would have been maybe not the best thing for him to say, "I'll not pick up that chain, and I'm not going to go get a board to do that," or "I'm not going to try to emulate you, even if you take it out on my hide, Mr. Rocco Surace," and he would have -- to think that this next jury that has got to sit in

here and try Rocco Surace --

THE COURT: No comment.

MR. SOLOMON: All right, sir.

Did this man do something upon which you can say, maybe, we'll consider something in his behalf? Yes. The evidence from the lady was that there was one thing that Rocco Surace didn't tell him to do, that he did on his own, and that was the peroxide, and that was the wiping it down. Turned mind, perverted mind that it might be over her, he got that peroxide to wipe her down and care for her wounds.

There was testimony that she went out and got some sugar and water and brought it back. That was his, not Rocco Surace's instruction. That isn't much of a thread to hang things on, is it, that after this horrendous beating you administer -- after copying and emulating the great Rocco Surace, that you went out and you got peroxide and you got some water and sugar because she was a diabetic, without his direction, on your own, without the direction of Rocco Surace.

MR. McHALE: I object. There is no such testimony in the record.

MR. SOLOMON: Yes, Judge. He

sent her out there --

THE COURT: It is in the testimony.

MR. SOLOMON: I am going to review with you, just for a moment, certain worse, damaging, aggravating circumstances shall be limited to the following and that's what you heard from Mr. McHale. It says, "Limited to the following."

Although it says, "mitigating circumstances shall be the following," it doesn't say, "Limited to." So, you can consider other elements.

MR. McHALE: Objection.

THE COURT: Sustained.

MR. SOLOMON: You will, then, have to consider these elements and weigh them. The defendant has no significant history of prior criminal activity. Now, you can let your minds figure that one out. Never before has this man ever done anything violent.

MR. McHALE: Objection. This is not evidence.

THE COURT: Sustained.

MR. SOLOMON: The State, Your

Honor, has admitted that he has not been convicted of anything.

THE COURT: No, that is not their testimony, sir. That is not his statement.

MR. SOLOMON: The defendant acted under extreme duress or under the substantial domination of another person -- Rocco Surace.

The capacity of the defendant to appreciate the criminality of this conduct and to conform his conduct to the requirements of the law were substantially impaired. I couldn't say that. There is no proof of that, and I say to you that any person that would do what he did has to be not in this world.

Prior to the State, three psychiatrists have ruled that he was sane.

MR. McHALE: Objection, Your Honor.

THE COURT: Sustained.

Mr. Solomon, you are confined, sir, to what has been brought out in the evidence.

MR. SOLOMON: The question arises, then, what thread can you hang it on? What can you

give him? Can you give him the fact that he pled guilty to you and he seeks mercy?

You can give him the fact that after this two-hour stint, or whatever period of time passed by, it must have dawned on his head, the enormity of what he did, and he started to take care of her with the peroxide and get some water and sugar into her.

MR. McHALE: I object. There is no evidence.

THE COURT: Yes, there is. The testimony is that there was sugar set out for her.

MR. McHALE: Not that this defendant did anything.

THE COURT: Well, it was at their directions. Overruled.

MR. SOLOMON: The question that arises, shall we take the man's life, or shall we put him in prison until he's 49 years old? I think if the State desired to put everybody to death, they would say so. 25 years wouldn't be there. The life sentence here is a 25-year minimum -- minimum. However you are right now, whatever age you are, add 25 years to it. He will go nowhere. He will be punished.

Now the question is, what shall you do? Is there a thread there upon which to hang any hope for this man, or at least let him live someplace in prison, and I say there is. The fact that he came in here and asked for mercy -- the fact that he came in here and that he went out and he did these things to her to relieve her and to wipe her down and to get her sugar and water, that might be very very thin to you, but that is a spark, and if there is a spark, there is a place for hope. It may be, at some future time during this 25-year period of time, if you put him in prison, that the whole system, our state and the rest of these states, will wise up and then say, "Now, we have this man in our custody. Let us see what makes him tick."

Richard Speck -- Richard Speck and six nurses, was it? Life imprisonment.

MR. McHALE: Judge, I object.

THE COURT: Sustained.

MR. SOLOMON: We feel that it is a greater punishment, much greater punishment to see that he spends his life in prison,

and there is no hope of ever getting out, at least for 25 years, and we leave it in your hands. Thank you.

THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of first-degree murder.

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your verdict should be based upon the evidence which has been presented to you in these proceedings.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:

"A: that the crime for which the defendant was to be sentenced was committed while the defendant was under the sentence of imprisonment;

B: that at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use (threat) of violence to some person;

C: that the defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons;

D: that the crime for which the defendant is to be sentenced was committed while the defendant was engaged, was an accomplice, in the commission of or attempt to commit any robbery, arson, burglary, involuntary sexual battery, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb;

E: that the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

F: that the crime for which the defendant is to be sentenced was committed for pecuniary gain;

G: that the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function of the enforcement of laws;

H: that the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel."

Heinous means extremely wicked or shockingly evil.

Atrocious means outrageously wicked and vile.

Cruel means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence to life imprisonment.

Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these:

"A: that the defendant has no significant history of prior criminal activity;

B: that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance;

C: that the victim was a participant in the defendant's conduct or consented to the act;

D: that the defendant was an accomplice in the offense for which he is to be sentenced, but the

offense was committed by another person, and the defendant's participation was relatively minor;

E: that the defendant acted under extreme duress or under the substantial domination of another person;

F: the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

G: age of the defendant at the time of the crime."

Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision.

Proof of an aggravating circumstance beyond a reasonable doubt is evidenced by which the understanding, judgment, and reason of the jury are well-satisfied and convinced to the extent of having a full, firm, and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt.

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense should be wholly disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based on the facts as you find them from the evidence and the law as given you by the Court. Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist.

Based on these considerations, you should advise the Court whether the defendant should be sentenced to life imprisonment or to death.

In these proceedings, it is not necessary that the verdict of

the jury be unanimous, but a verdict may be rendered upon the finding of a majority of the jury.

The fact that the determination of whether or not a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

Before you ballot, you should carefully weigh, sift, and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment upon the sole issue which is submitted to you at this time: whether a majority of your number recommends that the defendant be sentenced to death or to life in prison.

Should a majority of the jury determine that the defendant should be sentenced to death, you should recommend an advisory sentence as follows:

> "A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, William Thompson."

On the other hand, if, after considering all the law and the evidence touching upon the issue of punishment, a majority of the jury determines that the defendant should not be sentenced to death, then you should render an advisory sentence as follows:

> "A majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the defendant, William Thompson."

The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment.

You will now retire to consider your recommendation, and when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned into Court.

* * *

THE COURT: Anything else?

MR. SOLOMON; Again, we move for a Pre-Sentence Investigation.

THE COURT: The motion is denied.

William Thompson, you having previously entered a plea of guilty to first-degree murder, kidnapping, and involuntary sexual battery, as to the charge of kidnapping, it is the sentence of this Court that you be confined for life imprisonment in the State Penitentiary.

As to involuntary sexual battery, it is the sentence of this Court that you be sentenced to life imprisonment in this State Penitentiary.

As to the charge of first-degree murder, the Court has heard the testimony of the witnesses and has been impressed by the heinousness of this crime. I have been involved in the criminal side of the court as a prosecutor, as a judge, for -- since 1959, and I've been in this county since about 1940 or '41, and I can't recall in my recollection of cases that have happened in this county anyone, any case that has ever been any more heinous and heartless and violent than this case. To brutalize a fellow human being, as such, by beating them with a chair leg, by jamming a chair leg into the vagina of a fellow human being, and twisting it and kicking it and striking it with your hand, and then beating, again, the victim again on all

parts of her body, so much so that eighty percent of her body was traumatized; to then go out and get a billy club out of an automobile and come back inside and again jam that billy club into the vagina of this victim to the point where you tore the inner inside of her body -- the pain is excruciating -- the nature of the acts that you have committed in this case -- I don't think that if I were you that I could ever have a night in which I could sleep. It is one of the more vicious, heartless crimes, and I'm satisfied, sir, that you did every bit, those chain marks on this woman's body, her nose -- you could see through the nostril from where her nose was torn -- her buttocks and her back, completely black-and-blue -- it is just to me such a shocking, heartless act. The jury has also seen the necessity, sir, in this case to recommend the extreme penalty.

The Court having heard the testimony, having accepted the recommendation of the jury in this case, and you having been convicted of the charge of first-degree murder, you are hereby sentenced to death by electrocution.

The Court wants to advise you that in cases where there is the death penalty that there is an automatic review by the appellate court. You have already been appointed a Public Defender in this matter to represent you because of your indigency, and it is the intention of this Court to make sure that you have proper representation so that you may exercise every right that you have under the law of this country and this state.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR DADE COUNTY

CRIMINAL DIVISION

CASE NO. 76-3350

STATE OF FLORIDA,)

Plaintiff,)

vs.) SENTENCE

ROCCO JAMES SURACE and)
WILLIAM LEE THOMPSON,

Defendants.)

_____)

THIS CAUSE is now before the Court for sentencing. **WILLIAM LEE THOMPSON**, defendant, pled guilty and was adjudicated guilty of First Degree Murder, Involuntary Sexual Battery, and Kidnapping. Under the provisions of Section 921.141, Florida Statutes, a jury was impaneled and sworn for the purpose of recommending whether the defendant should be sentenced to life

imprisonment or death for the crime of First Degree Murder. After hearing extensive testimony relating to the aggravating circumstances and the mitigating circumstances, that jury returned an advisory recommendation that the Court sentence the defendant to death.

The mitigating circumstances in this case are as follows:

(1) The defendant in this case has no significant history of prior criminal activities.

(2) The defendant in this case is twenty-six (26) years old.

These mitigating circumstances are insufficient to outweigh the aggravating circumstances which are as follows:

(1) The capital felony was committed while the defendant was engaged

in involuntary sexual battery and kidnapping.

(2) The facts in this case show this to be an extremely violent and heinous crime. The victim was beaten with a chain and a billy club; struck with a chair leg, and burned with a cigarette lighter in the area of her vagina. The chair leg was forced into the vagina of the victim, and was then twisted inside and struck with the hand to force it far up into the vaginal area. The billy club was forced into the vagina of the victim that it ripped the entire portion of the vagina tearing the wall, causing such extreme pain, that the shock contributed in great part to the death of the victim, as stated by the medical examiner in his testimony. The beating of the victim resulted in

80% of the victim's body being covered with deep bruises, cuts and perforations, in addition to some of her front teeth being broken by blows from the defendant. In addition, the defendant burned the victim with lit cigarettes on various parts of her body.

Based on the foregoing aggravating circumstances, it is the opinion of this Court that the defendant has lost his right to have rights, including the most precious right of all - the right to life. It is therefore,

CONSIDERED, ORDERED AND ADJUDGED that the defendant, **WILLIAM LEE THOMPSON**, having been convicted of First Degree Murder, is hereby sentenced to death by electrocution.

For the crime of Involuntary Sexual Battery, the defendant, **WILLIAM LEE**

THOMPSON, is sentenced to life imprisonment.

For the crime of Kidnapping, the defendant, **WILLIAM LEE THOMPSON**, is sentenced to life imprisonment.

DONE AND ORDERED in open court at Miami, Florida, this 20th day of September, 1978.

/s/
JOHN A. TANKSLEY
Circuit Judge

SUPREME COURT OF FLORIDA

WILLIAM LEE THOMPSON, Petitioner, vs. RICHARD DUGGER, Respondent. WILLIAM LEE THOMPSON, Appellant, vs. STATE OF FLORIDA, Appellee. Supreme Court of Florida. Case Nos. 70,739 & 70,781. September 9, 1987.

(PER CURIAM.) William Lee Thompson appeals the denial of his Florida Rule of Criminal Procedure 3.850 motion to vacate judgment and sentence of death. He also petitions this Court for a writ of habeas corpus and a stay of execution from his second death warrant. We have jurisdiction. Art.V, § 3(b)(1) Fla. Const. We conclude that the recent United States Supreme Court decision in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), requires this Court to reverse the denial of his 3.850 motion and remand this cause for new sentencing proceedings. In light of our ruling on

Thompson's 3.850 motion, the petition for habeas corpus is moot. We continue the stay of execution previously entered.

This now Thompson's fourth appearance before us. Thompson initially pled guilty to first-degree murder, kidnapping, and involuntary sexual battery. We allowed him to withdraw his plea on voluntariness grounds and remanded the case for further proceedings. Thompson v. State, 351 So.2d 701 (Fla. 1977). He then entered a second plea of guilty to these offenses. An advisory jury was empaneled in the sentencing phase and recommended the death sentence, which the judge imposed. We affirmed the conviction and sentence in Thompson v. State, 389 So.2d 197 (Fla. 1980). Thompson filed a 3.850 motion and we

affirmed denial of relief in Thompson v. State, 410 So.2d 500 (Fla. 1982). Thompson then petitioned for federal habeas corpus relief, and the state waived any claim that Thompson had failed to exhaust state remedies. Multiple claims were raised and relief was denied by the United States District Court, and the Eleventh Circuit Court of Appeals affirmed. See Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, 107 S.Ct. 1986 (1987).

We address Thompson's claim in the present rule 3.850 post-conviction proceeding that involves the failure of the sentencing judge to allow presentation and jury consideration of nonstatutory mitigating circumstances in the sentencing phase. It directly concerns

the principles of law set forth by the United States Supreme Court in its recent decision in Hitchcock v. Dugger. The Supreme Court had granted certiorari to determine whether Hitchcock was correct in contending that his sentence of death under a Florida statute was inconsistent with the requirement that any relevant mitigating evidence may be considered. The United States Supreme Court's unanimous opinion noted that "other Florida judges conducting sentencing proceedings during roughly the same period believed that Florida law precluded consideration of nonstatutory mitigating circumstances." Id. at 1823. As in the instant case, the trial judge in Hitchcock instructed the jury on the statutory mitigating circumstances, without mentioning non-

statutory evidence of mitigation that had been introduced. The Supreme Court concluded "that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, Eddings v. Oklahoma, and Lockett v. Ohio." Id. at 1824 (citations omitted). The Court concluded that in light of the fact that no showing of harmless error was made, the exclusion of the nonstatutory mitigating evidence rendered the death sentence invalid. We note that Hitchcock did present some nonstatutory mitigating evidence to the jury and defense counsel commented on it in closing argument.

We hold we are required by this Hitchcock decision to re-examine this matter as a new issue of law. The Eleventh Circuit in Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, 107 S.Ct. 1986 (1987), considered multiple issues including the same mitigating evidence issue presented to the United States Supreme Court. Because the Eleventh Circuit denied relief on this issue, the state argues that even though the United States Supreme Court ruling is contrary to the holding of the Eleventh Circuit, the procedural default rule applies. We reject this argument. In Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), we held that only a state supreme court or the United States Supreme Court can effect a sufficient

change of law to merit a subsequent post-conviction challenge to a final conviction and sentence. Id. at 931. We had previously ruled in a similar fashion as the Eleventh Circuit. Hitchcock v. State, 432 So.2d 42 (Fla. 1983). We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its Hitchcock opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default.

Thompson's sentencing occurred in September of 1978. The United States Supreme Court, in June of 1978, had released Lockett v. Ohio, 438 U.S. 586 (1978), which held unconstitutional Ohio's capital sentencing statute

limiting mitigating circumstances to those enumerated in the statute itself. In December of that year, three months after Thompson's sentencing, this Court directly addressed the issue in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), construing our statute as allowing nonstatutory mitigating circumstances to be considered by both the jury and the judge in the sentencing proceeding. We subsequently held in Harvard v. State, 486 So.2d 537 (Fla.), cert. denied, 107 S.Ct. 215 (1986), that "an appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out

in the capital sentencing statute in determining whether to impose a sentence of death or life imprisonment without parole for twenty-five years." Id. at 539.

Our review of the trial court record in the instant cause reveals, first, that the state, in its closing arguments to the advisory sentencing jury listed the statutory mitigating circumstances as those which the jury could consider in its deliberations. Second, Mr. Thompson's defense counsel, in his closing arguments, attempted to advise the jury that, although the statute limited aggravating circumstances to those explicitly set out, it did not so limit the mitigating circumstances. The state objected to this statement and the trial court sustained

the objection.* The trial judge instructed the jury as to mitigating circumstances in the same manner as the trial judge did in Hitchcock. Under these circumstances, we have no alternative but to conclude Mr. Thompson's death sentence was imposed in violation of Lockett, and in violation of the United States Supreme Court's Hitchcock decision. We find he is entitled to a

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*The record reveals the following exchange:

> [DEFENSE COUNSEL]: I am going to review with you, just for a moment, certain worse, damaging, aggravating circumstances shall be limited to the following and that's what you heard from [the prosecutor]. It says, "Limited to the following." Although it says, "mitigating circumstances shall be the following," it doesn't say, "limited to." So, you can consider other elements.
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained

new sentencing hearing. On Mr. Thompson's remaining contentions, we find that procedural default operates to bar any challenge here; these issues have been presented and have been previously resolved in the federal courts when the state waived exhaustion of state remedies.

Accordingly, we remand this cause for a new sentencing hearing by a new jury at-which time Mr. Thompson shall be allowed to present all appropriate nonstatutory mitigating evidence. We direct that this sentencing hearing be completed and the sentence imposed within ninety days from the date this opinion is final. We find the habeas corpus petition moot and continue the stay of execution pending final disposition of this case.

It is so ordered. (McDONALD, C.J., and OVERTON, EHRLICH, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur.)

SUPREME COURT OF FLORIDA

Monday, December 7, 1987

WILLIAM LEE THOMPSON,	)	CASE NO. 70,739
Petitioner,	)	
vs.	)	
RICHARD DUGGER,	)	
Respondent.	)	
WILLIAM LEE THOMPSON,	)	CASE NO. 70,781
Appellant,	)	
vs.	)	
STATE OF FLORIDA,	)	Circuit Case No. 76-3350B (Dade)
Appellee.	)	

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Respondent/Appellee,

IT IS ORDERED that said Motion be and the same is hereby denied.

The Motion to Stay the Mandate filed in the above cause by attorney for Respondent/Appellee is granted and proceedings in this Court and in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida are hereby stayed to and including January 6, 1988, to allow Respondent/Appellee to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

OVERTON, EHRLICH, SHAW AND GRIMES, JJ., concur McDONALD, C.J., BARKETT and KOGAN, JJ., dissent

A True Copy

TEST
//s//
Sid J. White
Clerk Supreme Court
TC
cc:
Hon. Richard P. Brinker, Clerk
Hon. Edward D. Cowart, Judge
Mark Evan Olive, Esquire
Michael L. Von Zamft, Esquire
Richard L. Kaplan, Esquire

A-55

William Lee THOMPSON,
Petitioner-Appellant,
Cross-Appellee,

v.

Louie L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
Respondent-Appellee, Cross-Appellant.

No. 84-5815.

United States Court of Appeals,
Eleventh Circuit.

April 10, 1986.

Rehearing and Rehearing En Banc
Denied May 30, 1986.

After remand, 714 F.2d 1495, the United States District Court for the Southern District of Florida, James C. Paine, J., denied relief on petition for writ of habeas corpus, and the petitioner appealed. The Court of Appeals, Kravitch, Circuit Judge, held that although defense counsel's failure to conduct an investigation of the petitioner's background fell outside the

scope of reasonably professional assistance, the petition was not entitled to relief as the jury still would have concluded that the balance of aggravating and mitigating circumstances warranted death.

Affirmed.

Michael L. Von Zamft, Talburt, Kubicki, Bradley & Draper, Miami, Fla. (court-appointed), Diane E. Marger, Ft. Lauderdale, Fla., for petitioner-appellant, cross-appellee.

Jim Smith, Atty. Gen. of Fla., Calvin L. Fox, Asst. Atty Gen. of Fla. Dept. of Legal Affairs, Miami, Fla., for respondent-appellee, cross-appellant.

Appeals from the United States District Court for the Southern District of Florida.

Before **GODBOLD**, Chief Judge, **KRAVITCH** and **HATCHETT**, Circuit Judges.

KRAVITCH, Circuit Judge:

William Thompson, a prisoner of Florida, filed a petition for a writ of habeas corpus in the federal district court asking that his murder conviction and death sentence be set aside. After an evidentiary hearing the district court denied relief. We affirm.

BACKGROUND

The Florida Supreme Court summarized the facts of the crime in deciding Thompson's direct appeal:

> The appellant Thompson, Rocco Surace, Barbara Savage, and the victim Sally Ivester were staying in a motel room. The girls were instructed to contact their homes to obtain money. The victim received only $25 after telling the others that she thought she could get $200

> or $300. Both men became furious. Surace ordered the victim into the bedroom, where he took off his chain belt and begin hitting her in the face. Surace then forced her to undress, after which the appellant Thompson began to strike her with the chain. Both men continued to beat and torture the victim. They rammed a chair leg into the victim's vagina, tearing the inner wall and causing internal bleeding. They repeated the process with a night stick. The victim was tortured with lit cigaretes and lighters, and was forced to eat her sanitary napkin and lick spilt beer off the floor. This was followed by further severe beatings with the chain, club and chair leg. The beatings were interrupted only when the victim was taken to a phone booth, where she was instructed to call her mother and request additional funds. After the call, the men resumed battering the victim in the motel room. The victim died as a result of internal bleeding and multiple injuries. The murder had been witnessed by Barbara Savage, who apparently feared equivalent treatment had she tried to leave the motel room.

Thompson v. State, 389 So.2d 197, 198 (1980).

Thompson and Surace both pled guilty and were sentenced to death, but these pleas and sentences were set aside by the Florida Supreme Court. Thompson v. State, 351 So.2d 701 (1977); Surace v. State, 351 So.2d 702 (1977). Upon remand, Thompson again pled guilty, and again was sentenced to death. The Florida Supreme Court affirmed, 389 So.2d 197 (1980); the state courts also denied collateral relief. 410 So.2d 500 (1982). Thompson then filed a petition for habeas relief in the federal district court raising numerous grounds. He subsequently sought to amend his petition to add claims based on ineffective assistance of counsel. Because these additional claims had not been presented to the Florida courts, the district court granted a continuance to

allow Thompson to exhaust the claims in state court and the state appealed. This court affirmed the district court's continuance, but also stated that the district court, in its discretion, could have accepted the state's offer to waive exhaustion with respect to the new claims. Thompson v. Wainwright, 714 F.2d 1495 (11th Cir.1983), cert. denied, 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 562 (1984). On remand, the district court accepted the waiver, and, after an evidentiary hearing, found all of Thompson's claims without merit.

I. INEFFECTIVE ASSISTANCE CLAIMS

Thompson contends that his counsel, Harold Solomon, was ineffective during entry of his second guilty plea and the sentencing proceeding. Solomon's repre-

sentation of Thompson began after the first plea was set aside and continued through the state proceedings for collateral relief.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court articulated the standards for reviewing claims of ineffective assistance of counsel. The petitioner can prevail only if counsel's "acts or omissions were outside the wide range of professionally competent assistance," Id., 104 S.Ct. at 2066, and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 2068. The questions of whether counsel's performance was deficient, and whether the defendant was prejudiced by any deficiency are

mixed questions of fact and law. 104 S.Ct. at 2070. The district court ruled that Solomon was not ineffective, and found that numerous of the alleged errors by Solomon resulted from Thompson's own actions.

A. Entry of the Guilty Plea

[1]In Hill v. Lockhart, _ U.S. _,106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985), the Court made clear that the Strickland standards apply to the assistance of counsel in entering a plea. The record here indicates that after the Florida Supreme Court vacated Thompson's first guilty plea, Thompson again decided to plead guilty, although Solomon discussed the ramifications of the plea with Thompson and told him that he was prepared to try the case. Nevertheless, Thompson

contends that Solomon's assistance before and during the plea proceeding fell outside the wide range of professionally competent assistance, and that but for Solomon's ineffective assistance there is a reasonable probability that Thompson would have been found incompetent to enter a plea.

In Strickland, the Court noted that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." 104 S.Ct. at 2070. With respect to the plea proceeding, petitioner's ineffective claim falls into this category. Thompson contends that Solomon was aware that Thompson had mental difficulties, and yet allowed the plea proceeding to go forward. Although

the record does indicate that Solomon believed his client had mental problems, such problems do not necessarily mean a defendant is incompetent to enter a plea; moreover Thompson has not identified anything Solomon could have done that would have changed the outcome of the plea proceedings. At the time Thompson was first charged in 1976, four psychiatrists examined him and all four found him competent to stand trial. Nevertheless, Solomon petitioned the court for a new examination to determine Thompson's competence, which request was denied. At the plea proceeding, Thompson brought the possibility of Thompson's incompetence to the trial judge's attention. After interrogating Thompson, the trial judge was satisfied with Thompson's competence to enter a plea. Because we

are unaware of any further steps Solomon could have taken to prevent the guilty plea, or to convince the court that Thompson was incompetent, we hold that Thompson's claim of ineffective assistance of counsel at his plea proceeding fails under the prejudice prong of the Strickland test.

B. The Sentencing Hearing

Thompson's claim of ineffective assistance at his sentencing hearing is more difficult. At this hearing the state called police officers, the medical examiner, the victim's mother, and most importantly, Barbara Savage, who related the details of the crime. Solomon did not call any witnesses. Thompson challenges many of Solomon's acts and

omissions as falling "outside the wide range of professionally competent assistance." Strickland, 104 S.Ct. at 2066. The district court ruled, however, that Solomon was greatly hindered by Thompson's own actions; specifically, Thompson directed Solomon not to investigate certain matters and refused to testify at the sentencing hearing. Thompson's actions affect both our analysis of whether Solomon was deficient, and whether any deficiencies meet the prejudice standard of Strickland.

1. Failure to Investigate and Present Mitigating Evidence

Thompson's significant allegations that Solomon was ineffective in the

sentencing proceeding fall into three categories:[1] failure to investigate and present possible mitigating circumstances; failure to move for a continuance when Thompson refused to testify; the closing argument, which Thompson contends did more harm than good.

[2] A criminal defense attorney has a duty to investigate, but his duty is limited to reasonable investigation. Strickland, 104 S.Ct. at 2066. Thompson alleged several areas of investigation ignored by counsel: among others, Solomon did not investigate the background of the co-defendant Surace, and Solomon neither contacted the psychiatrists who had examined Thompson in 1976 nor considered offering the psychiatric reports into evidence. In these two respects, we agree that Solomon's performance was

insufficient. In a capital case, where a defendant's life may well depend on the extent and nature of his participation, the background of a codefendant could be critical. Here, one of Solomon's goals was to affix blame for the crime on Surace, and his failure to investigate Surace's background is, therefore, not understandable. Under the Florida capital statute, psychiatric expertise is relevant to certain statutory mitigating factors. See Fla.Stat.Ann. §921.141(6). Moreover, Solomon testified in the district court that he thought Thompson was retarded; hence his failure to contact the examining psychiatrists or make any other effort to present Thompson's limited mental capacity to the jury is inexplicable.[2]

[3] Thompson also contends that

Solomon was ineffective for failing to investigate Thompson's own background, including childhood and early family life, school records and service records. Solomon, however, testified in the district court that Thompson directed him not to investigate his past. In Strickland, the Supreme Court noted the importance of the defendant's communications with his attorney in scrutinizing the attorney's decision whether to investigate. 104 S.Ct. at 2066. The Court stated that "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Id. Nonetheless, Thompson contends that Solomon should not have heeded

his request because Solomon was aware that Thompson was experiencing mental difficulties.

This court addressed a similar issue in Mitchell v. Kemp, 762 F.2d 886, 889-90 (11th Cir.1985). In Mitchell, counsel did not investigate a capital defendant's background, in part because the defendant directed him to leave his family "out of it." 762 F.2d at 889. Although the court found that counsel was not ineffective, it noted that the attorney did not blindly follow Mitchell's instructions: the attorney did not probe deeply into Mitchell's reasons for not wishing to involve his family, but did make an independent evaluation of character witnesses by an in-depth conversation with Mitchell. Id. at 890. The new Fifth Circuit also has held that although a

capital defendant's stated desire not to use character witnesses does not negate the counsel's duty to investigate, it limits the scope of the investigation required. Gray v. Lucas, 677 F.2d 1086, 1093-94 (5th Cir.1982), cert. denied, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983); see also Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir.1983) (defendant's "instruction that his lawyers obtain an acquittal or the death penalty did not justify his lawyer's failure to investigate the intoxication defense. . . . Uncounselled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better-informed advice."), cert. denied, ___ U.S. ___, 105 S.Ct. 447, 83 L.Ed.2d 373 (1984).

The reason lawyers may not "blindly

follow" such commands is that although the decision whether to use such evidence in court is for the client, Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir. 1983) (lawyer bound by client's counselled decision to not rely on insanity defense), cert. denied, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984) the lawyer first must evaluate potential avenues and advise the client of those offering possible merit. Here, Solomon did not evaluate potential evidence concerning Thompson's background. Thompson had not suggested that investigation would be fruitless or harmful; rather, Solomon's testimony indicates that he decided not to investigate Thompson's background only as a matter of deference to Thompson's wish. Although Thompson's directions may have

limited the scope of Solomon's duty to investigate, they cannot excuse Solomon's failure to conduct any investigation of Thompson's background for possible mitigating evidence. Solomon's explanation that he did not investigate potential mitigating evidence because of Thompson's request is especially disturbing in this case where Solomon himself believed that Thompson had mental difficulties. An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment. See Code of Professional Responsibility EC 7-12 (Fla.Stat.Ann. 1983).[3] We conclude that Solomon's failure to conduct any investigation of Thompson's background fell outside the scope of reasonably professional assistance.

[4] Solomon's plan at the hearing was to elicit certain mitigating circumstances through cross-examination, call Thompson, who would express his remorse, and in closing, plead to the jury for mercy. Solomon testified, however, that when the time came for Thompson to take the stand, Thompson refused, stating that he was afraid of making a fool of himself before the jury. Solomon urged Thompson to testify, but Thompson was adamant. Two days later, Thompson did take the stand, at Surace's trial. There Thompson took the majority of the blame for the torture-murder himself, deflecting blame from Surace.

The petitioner contends that when he refused to testify, Solomon should have moved for a continuance to determine the basis of his refusal. Although Thompson

now claims that he refused to testify because of threats from Surace, according to Solomon, Thompson did not mention these threats until after the sentencing was complete; Thompson's explanation at the time was that he did not want to make a fool of himself. Solomon had prepared Thompson to testify, and he urged Thompson to do so. The ultimate decision whether to testify is for the defendant, and a defendant who rejects his lawyer's advice on such a matter may not later challenge the lawyer's effectiveness. Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir.1983). Faced with Thompson's sudden refusal to testify, Solomon apparently made a decision to carry on with the remainder of his presentation. In light of Thompson's adamant position, Solomon's decision to go forward as best

he could under the circumstances was not outside the bounds of reasonably professional assistance.

[5] Our conclusion that aspects of Solomon's representation fell outside the range of reasonably professional assistance requires addressing the prejudice prong of the Strickland test. In discussing the showing a petitioner must make to obtain a new trial on the ground of errors by counsel, the Supreme Court specifically rejected an "outcome-determinative standard," 104 S.Ct. at 2068, under which the petitioner would have to prove by a preponderance of the evidence that the result would have been different had the petitioner been provided reasonably effective representation. Instead the Court set forth a standard under which:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. Thompson presented considerable evidence at the district court hearing. We must first consider what portion of this evidence could have been presented and argued at the sentencing hearing by a reasonably effective counsel, and then whether such evidence may have been persuasive to a jury. We also must review the evidence actually presented to the sentencing jury, because a "conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. at

2069. If we are confident that the jury still would have concluded that the balance of aggravating and mitigating circumstances warranted death, then the petitioner cannot obtain relief. Id.

The evidence of Thompson's background presented to the district court consisted mostly of his Marine Corps and school records. The Marine Corps records indicate that Thompson was dishonorably discharged for a misrepresentation on his enlistment papers: he stated that he had not committed homosexual acts when in actuality he had a significant history of homosexual conduct. Thompson's elementary school records include grades, teacher comments, evaluations by the school psychologist, and intelligence test scores. They indicate that he was

mildly retarded, had poor motor skills, had great difficulty in basic subjects of reading, writing and arithmetic, was hyperactive, and difficult.

Thompson also proffered the psychiatric evaluations prepared in 1976 and ignored by Solomon; these exhibits further document Thompson's troubled early years. They indicate Thompson left school in the ninth grade at the age of eighteen, that he had had difficulty getting along with his parents, and that he had been a drug abuser. All four psychiatrists who examined Thompson in 1976 concluded that he was sane at the time of the offense and that he was capable of assisting in his defense. This does not mean, however, that no psychiatric mitigating factors, statutory or nonstatutory, were indicated in

the reports. Three of the psychiatrists diagnosed Thompson as having a personality disorder; the fourth questioned the extent of Thompson's participation in the crime due to possible intoxication and drug use.

Finally, Thompson contends that reasonable investigation of Surace would have revealed that Surace was involved with violent motorcycle gangs, had been convicted of intimidating a government witness, and at age fourteen had killed a playmate. In sum, reasonable investigation would have yielded evidence of Thompson's low intelligence and troubled past and the violent reputation of his codefendant.[4]

Even had the jury heard this evidence, however, we are confident that Thompson's sentence would have been the

same. The jury's determination was strongly supported by the aggravating circumstances introduced in the record. Nothing Solomon could have presented would have rebutted the testimony concerning Thompson's participation in the brutal torture murder. The testimony indicated that although Surace initiated the beatings, Thompson took over, beating the victim with a chain, his fist, a chair leg, and a billy club. The testimony also indicated that it was Thompson who actually raped the victim with the chair leg and billy club. After hearing testimony that Thompson committed these atrocities, the jury heard nothing from Thompson himself in reply. As noted above, Thompson, and not Solomon, was responsible for his failure to tes-

tify. We do not believe that there is a reasonable probability that evidence of a difficult youth, an unsavory codefendant, and limited mental capacity would have altered this jury's decision.

Furthermore, the evidence offered in the district court would not be particularly persuasive even had the crime been less egregious. Barbara Savage testified at the trial as to Surace's connection with motorcycle gangs and that Thompson was following Surace's lead throughout the incident, and Solomon argued this point to the jury. With respect to Thompson's mental condition, which was not touched upon at the sentencing hearing, although the psychiatric reports suggested a personality disorder, and the school records indicated low intelligence, none of the

material indicated that Thompson was suffering any specific disturbance at the time of the crime which would have mitigated his participation. Finally, although Thompson's difficulties in his early years were ignored at the sentencing hearing, he has produced no witnesses, and we doubt that the jury would have found mere copies of school records particularly persuasive.

2. Closing Argument

[6] Thompson also attacks Solomon's closing argument, set forth in the margin. Thompson contends that Solomon unnecessarily stressed the horror of the crime, and that he should not have referred to his court appointed status. This court has previously condemned references to court-appointed status, arguing that such references

"effectively stack the odds against the accused." Goodwin v. Balkcom, 684 F.2d 794, 805-06 (11th Cir.1982), cert. denied, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983). In King v. Strickland, 714 F.2d 1481, 1491 (1983), reinstated, 748 F.2d 1462 (11th Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 2020, 85 L.Ed.2d 301 (1985), this court granted relief on a claim of ineffective assistance of counsel based in part on a closing argument which "did more harm than good." 748 F.2d at 1464.

Counsel representing a defendant in a death case is in a difficult position, and Solomon's failure to present any mitigating evidence made the task even more difficult. Where, as here, the defendant has pleaded guilty, counsel can hardly make a credible closing

argument asking for mercy without acknowledging the crime; nor can he ignore the defendant. Thompson argues that Solomon's discussion of Thompson as a "loser" and of the heinous nature of the crime went far beyond the need to maintain credibility. In this case, Solomon may have gone beyond what was necessary. We decline, however, to further critique the closing; reviewing courts must not unnecessarily "grade counsel's performance," Strickland v. Washington, 104 S.Ct. at 2070, and this admonition seems particularly compelling in the case of closing argument, an inherently subjective task. Here, in light of the overwhelming evidence of aggravating circumstances, we believe that Thompson has failed to show a reasonable probability that the closing

argument, even considered together with Solomon's failure to present mitigating evidence, changed the outcome. We therefore need not determine whether the argument met the standard of reasonably professional assistance. 104 S.Ct. at 2070.

In only one case, King v. Strickland, have we relied on counsel's closing argument to grant relief under the Strickland v. Washington standard. The closing argument in King is in one respect similar to the argument in this case; both counsel referred to their court-appointed status. In King, however, counsel in effect apologized to the jury for representing such a horrible person, 714 F.2d 1491, and totally disassociated himself from his client. Solomon's reference to his status was in

an attempt to evoke sympathy for his client, and Solomon did not attempt to disassociate himself from Thompson. More important, King's conviction, unlike Thompson's was based on circumstantial evidence, and such convictions always present a better case for mercy to the sentencing jury. 748 F.2d at 1464.

In sum, the overwhelming evidence of aggravating circumstances convinces us that there is not a reasonable probability that the jury would have changed its sentencing conclusion had Solomon presented and argued the mitigating evidence now offered, and Thompson's claim of ineffective assistance at his sentencing hearing therefore must fail under the prejudice prong of Strickland v. Washington.

II. RESTRICTION ON MITIGATING EVIDENCE

A. Nonstatutory Evidence

Thompson contends that the trial court restricted consideration of nonstatutory mitigating factors in violation of Lockett v. Ohio, 438 U.S. 586, 606-08, 98 S.Ct. 2954, 2965-67, 57 L.Ed.2d 973 (1978). He argues that the jury instuctions, coupled with objections the judge sustained when Solomon attempted to advise the jury that they were not limited to statutory mitigating circumstances and when he sought to elicit testimony that Thompson was taking drugs at the time of the crime, all indicate that evidence of nonstatutory mitigating circumstances was restricted.

The district court found that

Thompson had presented this claim to the Florida courts on direct appeal and therefore considered it on the merits and denied relief. Based on the briefs and opinions in Thompson's state appeal, the state contends that the issue was not presented on Thompson's state appeal and asks that we apply procedural default to the claim. See Ford v. Strickland, 696 F.2d 804, 816-17 (11th Cir. 1983) (en banc) (Florida rule that all grounds must be raised on direct appeal adequate reason to bar federal review). The state argues that although it has waived exhaustion of the claim, it has not and does not waive procedural default. This argument raises difficult questions. First, we note that the Lockett claim was one of the original claims in Thompson's petition, filed on

February 24, 1982. Not until July 9, 1984, the day of the evidentiary hearing, did the state first assert that the claim had not been presented to the state courts. Moreover, at no time did the state file a motion to dismiss the claim. In the meantime, the district court had held a hearing on whether to continue its consideration of the petition, this court had entertained an interlocutory appeal, the state had offered an unconditional waiver of exhaustion, and the district court had exercised its discretion to accept that waiver. Throughout this time (February 24, 1982-July 9,1984), the parties acted under the assumption that the claims in the original petition had been presented to the Florida courts. See, e.g., Jenkins v. Andersen, 447 U.S. 231, 100

S.Ct. 2124, 2127 n.1, 65 L.Ed.2d 86 (state may waive procedural default by not asserting it in a timely manner). Second, the state's offer of a waiver of exhaustion was unconditional. Now the state requests that the federal courts apply procedural default, a state law ground of decision, to a claim in the petition. The district court's acceptance of the waiver was discretionary, and had the court been told that the state wished the court to apply a state law ground of decision, the district court may well have chosen to decline the state's waiver. See Thompson v. Wainwright, 714 F.2d 1495, 1508-09 (district court should decline waiver of exhaustion if undecided questions of state law exist). Accordingly, it seems quite possible that the state has waived

procedural default. We need not decide this question, however, because the district court was clearly correct in declining Thompson relief on the merits of his Lockett claim.

[7] This court recently has described the method for analyzing Lockett claims such as the one advanced by Thompson. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir.1985) (en banc). A court should consider all the circumstances, including the status of Florida law at the time of sentencing, the trial record, and proffers of nonstatutory mitigating evidence claimed to be available. 770 F.2d at 1517. Here, at the time of sentencing, the confusion in Florida law had partially been alleviated by Lockett, but the Florida Supreme Court had not yet issued

its clarifying opinion in Songer v. State, 365 So.2d 696, 699 (Fla. 1978).[6] Solomon, however, did not proffer any nonstatutory mitigating evidence at the sentencing hearing. Solomon also testified in the district court that in preparing for the sentencing hearing he did not feel constrained by Florida law in investigating nonstatutory mitigating circumstances.

Solomon did testify that he felt constrained when the trial court sustained objections to questions about alcohol and drug use by Thompson and Surace, and the record of the sentencing proceeding indicates that the court did limit cross-examination on this point. For example, Savage was not allowed to answer Solomon's question whether they

were taking any pills. Thompson however, did not proffer, either at trial or in the district court hearing, what the witness would have answered. Furthermore, in her pretrial deposition Savage did not state that Thompson was taking drugs, although she did indicate that Thompson and Surace were drinking heavily on the day of the crime, and this fact came out in other testimony. We conclude therefore that Thompson has not shown any excluded evidence that could have affected the sentence. The testimony introduced at the sentencing hearing indicated that at the time of the crime Thompson was well able to communicate, and that he and Surace concocted an alibi story. Accordingly, we find that additional evidence regarding intoxication would have been cumula-

tive and would not have made a difference to the sentencing jury.

In sum, with respect to nonstatutory mitigating circumstances, we conclude that Thompson did not proffer any significant nonstatutory mitigating circumstances either at sentencing or at the district court's evidentiary hearing and that his claim must therefore be denied.

B. Statutory Mitigating Evidence

[8] Thompson also contends that the trial court excluded evidence of statutory mitigating circumstances; specifically he argues that the court limited cross-examination intended to show that he was under the influence of an extreme emotional disturbance. Fla.Stat.Ann. §921.141(6)(b). The only

testimony Thompson claims was excluded, however, was Savage's response to questions concerning whether Thompson intended the beating to kill the victim. The trial judge did not rule that the testimony was irrelevant; rather he ruled that the witness could not testify to the subjective intentions of another person, and Thompson does not argue that this ruling was improper under the Florida rules of evidence. Lockett entitles a capital defendant to introduce all relevant mitigating evidence at sentencing, but does not require a state to abandon its rules of evidence concerning what is competent testimony. Cf. Martin v. Wainwright, 770 F.2d 918, 938 (11th Cir. 1985) (Lockett does not abrogate Florida evidentiary rule which prevented defendant from admitting

selected portions of documents without admitting entire document).

III. WHETHER THE COURT SHOULD HAVE FURTHER INQUIRED INTO THOMPSON'S COMPETENCY TO STAND TRIAL

[9,10] Thompson contends that the trial court should have conducted a hearing into his competency to stand trial. A court that has a bona fide doubt of the defendant's competency to stand trial must sua sponte conduct a hearing to consider that issue. Pate v. Robinson, 383 U.S. 375, 385, 387, 86 S.Ct. 836, 842, 843, 15 L.Ed.2d 815 (1966); Hance v. Zant, 696 F.2d 940, 948 (11th Cir.), cert. denied, 463 U.S. 1210, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983). The test for competency to stand trial is: whether the defendant

"has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). The district court found that no doubt had been raised of Thompson's competency.

[11] Three factors should be considered in determining whether the trial court violated Pate by not conducting a hearing on competency: (1) evidence of the defendant's irrational behavior; (2) his demeanor at trial; and (3) any prior medical opinion on his competency to stand trial. Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975). Before

the first plea proceeding in 1976, Thompson was examined by four psychiatrists, and all four found him competent to stand trial. Thompson filed a new motion for examination in connection with the 1978 plea proceeding, but as the Supreme Court of Florida noted, nothing in the motion indicated any "circumstances that had caused the mental condition of the appellant to change since those prior examinations." 389 So.2d at 199.

Thompson contends that his responses during the trial judge's interrogation at the plea proceeding raised a doubt as to his competency. The trial judge interrogated Thompson regarding any past mental problems, and whether he understood the proceedings and the ramifications of pleading

guilty. Thompson points to one response as raising a doubt: when the court asked Thompson if he had been employed in the past two years, Thompson answered yes; in fact, Thompson had spent the prior two years in either the county jail or on death row. This one incorrect response, however, hardly indicates that Thompson was incompetent. Thompson correctly answered numerous questions from the judge, and we conclude that there was no need for the judge to further inquire into Thompson's competency.

IV. AKE CLAIM

[12] Before the sentencing proceeding, Solomon requested that the court appoint experts to conduct psychiatric and neurological examinations

of Thompson. The trial court denied these requests and the Florida Supreme Court affirmed. 389 So.2d at 199. In his habeas petition, Thompson contends that the denial of psychiatric assistance unconstitutionally restricted the presentation of mitigating circumstances. Subsequent to the district court's ruling on the petition, the Supreme Court decided Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), in which it established a limited right to court-appointed psychiatric assistance in presenting a defense. We now evaluate Thompson's claim in light of Ake.

In Ake, the Supreme Court considered an indigent defendant's need for psychiatric assistance both at trial and at the death penalty sentencing hear-

ing. With respect to guilt or innocence, the Court held

> that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id., 105 S.Ct. at 1097.

Thompson's claim on appeal, however, is limited to the sentencing phase and the Court's discussion in Ake of the need for psychiatric assistance in capital sentencing proceedings was somewhat different. The Court focused on the fact that certain states place before the jury psychiatric evidence of a defendant's future dangerousness, and that the Court had approved such a

practice. Id. at 1097 (quoting Barefoot v. Estelle, 463 U.S. 880, 896-905, 103 S.Ct. 3383, 3395-3400, 77 L.Ed.2d 1090 (1983). The Court held:

> In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing hearing.

Id., 105 S.Ct. at 1097.

The motion filed with the trial court stated that counsel believed Thompson suffered from a mental defect "which would render him incapable of assisting in his defense, and may have precluded the Defendant from knowing right from wrong at the time of the alleged criminal acts." The trial court heard the motion, and again no

mention was made of mitigating circumstances. Because Thompson did not request psychiatric assistance to aid in presenting mitiating circumstances, Ake does not apply. Bowden v. Kemp, 767 F.2d 761, 764; Bowden v. Francis, ___ U.S. ___, 105 S.Ct. 1834, 1834-35, 85 L.Ed.2d 135 (1985) (O'Connor, J., dissenting from remand to court of appeals in light of Ake).[7] We hold therefore that Ake did not require appointment of a psychiatrist at the sentencing phase.

Thompson did argue in his motion for a new trial and his brief on direct appeal to the Florida Supreme Court that the denial of psychiatric assistance limited the development of mitigating circumstances. Ake, however, requires appointment of

showing of need is made before trial. 105 S.Ct. at 1097.[8]

V. COERCION OF THOMPSON'S PLEA

Finally Thompson contends that his decision to plead guilty, and to testify on behalf of Surace was not voluntary, but was coerced by threats from Surace. Thompson presented this claim to the Florida courts in a motion for collateral relief. The state trial court found Thompson's affidavit not credible, and refused to hold a hearing. The Florida Supreme Court affirmed. 410 So.2d 500 (1982).

At the district court hearing, Thompson testified that he was coerced into pleading guilty and testifying for Surace. He explained that while he and Surace were being held together in 1978, Surace told Thompson to take

credit for the killing or Surace would have him killed, and Thompson testified that he believed Surace could do this based on Surace's membership in motorcycle gangs and Surace's comrades in prison. Thompson introduced no evidence to corroborate this testimony, other than a stipulation by the state that at the time of Thompson's second plea, Thompson and Surace were transported to the county courthouse together and held in the same cell while in the courthouse, and testimony of Thompson's trial lawyers that Surace used Thompson as his "tool" and before the second plea proceeding Surace's counsel was attempting to convince Thompson to commit perjury. Surace testified in the district court and denied Thomp-

son's allegations. After hearing the testimony, the district court found that Thompson had not met his burden of proof, in effect finding that Thompson's testimony was not credible.

[13] Although Thompson challenges the voluntariness of his plea as a ground on appeal, he provides no legal arguments in his brief. As stated above, based upon Thompson's affidavit attached to his pleadings in the collateral proceeding, the state courts found his claim incredible and held no hearing. The district court received evidence on the claim at the evidentiary hearing, but in its order denying relief ruled that Thompson had not met his burden under section 2254 of proving that the conclusion of the state court on collateral review was

erroneous.[9] The effect of the section 2254 presumption was that Thompson was required to present convincing evidence that his plea was not voluntary; normally, a habeas petitioner need only demonstrate by a preponderance of the evidence that he is entitled to relief. 28 U.S.C. §2254(c); Thomas v. Zant, 697 F.2d 977, 986 (11th Cir. 1983). The district court's understanding of section 2254 was mistaken. Section 2254(d) does provide that a federal court considering a habeas petition must afford a presumption of correctness to state court factual findings, but only if the findings were made "after a hearing on the merits of a factual issue," and that hearing must meet the requirements set forth in section 2254(d)(1)-

(8). Here the state court refused to hold such a hearing, and thus the findings of the state courts in the collateral proceeding are not entitled to a presumption of correctness.

[14] Nevertheless, we do not believe that a remand is necessary. Although the state courts did not hold a hearing on collateral review, the state trial court held an adequate hearing on Thompson's plea at the time it was entered. The trancript of that proceeding is part of the record. The trial court placed Thompson under oath and specifically inquired:

> THE COURT: Has any persons [sic] used any threat, force, pressure, intimidation, or promised anything to you for the purpose of getting you to plead guilty to these charges?
>
> THE DEFENDANT: No, Sir.

THE COURT: Are you doing it voluntarily?

THE DEFENDANT: Voluntarily, sir.

The state trial court then announced that it found that Thompson's "decision to plead guilty has been made freely, voluntarily, and intelligently."

In Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), the Supreme Court stated that "the representations of the defendant [at a plea hearing] as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." 97 S.Ct. at 1629. The Court further ruled that the petitioner's "declarations in open court carry a strong presumption of verity." Id. In Moya v. Estelle, 696 F.2d 329 (5th Cir.1983),

the habeas petitioner contended that his own attorney had intimidated him into pleading guilty. The new Fifth Circuit held that in light of the petitioner's sworn statement at the plea proceeding that he had not been threatened and that he was satisfied with counsel, no evidentiary hearing was necessary on his claim in a federal habeas proceeding. 696 F.2d at 332-33. See also, Rogers v. Maggion, 714 F.2d 35, 38 n. 5 (5th Cir.1983).

Here, Thompson testified under oath that his plea was not coerced, and the state trial court so concluded. The district court in effect gave these findings a presumnption of correctness. We see little difference between the presumption of correctness under section 2254 and the "strong

presumption of verity" identified by the Supreme Court in Blackledge. Accordingly, the district court was correct in requiring Thompson to present convincing evidence that his plea was not voluntary and the district court's conclusion that Thompson failed to meet this burden is not clearly erroneous.

CONCLUSION

For the foregoing reasons, the order of the district court denying Thompson's petition for a writ of habeas corpus is AFFIRMED.

[1] Thompson complains of other aspects of Solomon's representation at the sentencing hearing, including his failure to object to admission of Surace's confession and his failure to object to comments the prosecutor made during closing which implied Thompson had the burden of proof of mitigating circumstances. We do not believe that any of the alleged errors of counsel played a role in the jury's consideration of aggravating and mitigating circumstances. Accordingly, we need not further consider these alleged errors.

[2] Although Solomon was ineffective for not contacting psychiatrists who had already examined Thompson, in the course of our discussion of Thompson's Ake v. Oklahoma claim, see note 8, infra, we consider and reject the possibility that Thompson was ineffective for not requesting court-appointed psychiatric assistance in developing mitigating evidence.

[3] Ethical Consideration 7-12 provides that:

> Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under a disability has no legal repre-

sentative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid.

If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

[4] In the district court, Thompson also presented testimony of a psychiatrist that certain of the statutory mitigating circumstances were present. We have determined, however, that Solomon was not ineffective in failing to obtain psychiatric evidence. Accordingly, we do not consider the psychiatric testimony in determining whether Thompson has

met the prejudice prong of Strickland v. Washington.

Your Honor, members of the jury: what I said to you yesterday was right. I asked you a key question, didn't I? Can you leave your minds open even if you hear horrendous evidence? Can you keep your minds open and not put in there the old Biblical term, "An eye for an eye and a tooth for a tooth," before you hear it all.

You know something here -- do you know that the Court-appointed lawyer, me, is the only person in this room with William Thompson? There is no mother. There is no father. There are no cousins or aunts or uncles or pastors. This man is an absolute total loser, and we might shrug our shoulders and say, "Well, after all, look what he did to this poor girl. Let's do it to him."

Is there one shred -- is there some evidence to back up the law the Judge is going to read to you? Is there some evidence that you could consider that might say, "Let us give him 25 years in prison."

He'll come out 49 years of age, if he comes out at that time. If some future parole commission reads all of the evidence that you heard, seeing everything in this

case and lets him out -- I doubt it.
When he made the decision to ask for mercy by pleading guilty --

MR. McHALE: I must object. That is not part of the evidence and it is not part of the law as to sentencing.

THE COURT: It is argument. Overruled.

MR. SOLOMON: Thank you.

The facts of life are that you ask a jury, when you plead guilty, to please consider mercy. Obviously, things pop into your mind. We're not children here. Mercy. How do you show this girl mercy?

There was no mercy shown this girl. Again, I come back to that question I asked you: can you take an eye for an eye and a tooth for a tooth and set it aside and accept what you hear.

Now, pecuniary gain? Well, maybe not so. What we're talking about there in that statute is robbery, the 7-11 killings -- they will go in, take twelve dollars and shoot him dead. Pecuniary gain? That is not what that statute read for, but it was a heinous crime. There is no question about it, not at all.

So, the question is, then, what thread is there upon which he hangs? What did he do and what occurrences happened to, say, well, let's put him in prison for 25 years and hopefully, some parole commission, after that, when they read through all this -- they will not -- don't underestimate the power of a Rocco Surace. He is it. He did it. He did it with him. He followed him. Rocco Surace terrorized not just the poor girl that died, but terrorized two other people. He terrorized them. Yes, he did. He was the leader; I bet he was.

Rocco Surace says, "Take this chain. She's your old lady. Do it to her," and he picked up on the theme and he started in. God forbid, it would have been maybe not the best thing for him to say, "I'll not pick up that chain, and I'm not going to go get a board to do that," or "I'm not going to try to emulate you, even if you take it out on my hide, Mr. Rocco Surace," and he would have -- to think that this next jury that has got to sit in here and try Rocco Surace --

THE COURT: No comment.

MR. SOLOMON: All right, sir.

Did this man do something upon which you can say, maybe, we'll

consider something in his behalf? Yes. The evidence from the lady was that there was one thing that Rocco Surace didn't tell him to do, that he did on his own, and that was the peroxide, and that was the wiping it down. Turned mind, perverted mind that it might be over here, he got that peroxide to wipe her down and care for the wounds.

There was testimony that she went out and got some sugar water and brought it back. That was his, not Rocco Surace's, instruction. That isn't much of a thread to hang things on, is it, that after this horrendous beating you administer -- after copying and emulating the great Rocco Surace, that you went out and you got peroxide and you got some water and sugar because she was a diabetic, without his direction, on your own, without the direction of Rocco Surace.

MR. McHALE: I object. There is no such testimony in the record.

MR. SOLOMON: Yes, Judge. He sent her out there --

THE COURT: It is in the testimony.

MR. SOLOMON: I am going to review with you, just for a moment, certain worse, damaging, aggravating

circumstances shall be limited to the following and that's what you heard from Mr. McHale. It says, "Limited to the following."

Although it says, "mitigating circumstances shall be the following," it doesn't say, "Limited to." So, you can consider other elements.

MR. McHALE: Objection.

THE COURT: Sustained.

MR. SOLOMON: You will then, have to consider these elements and weigh them. The defendant has no significant history of prior criminal actitivy. Now, you can let your minds figure that one out. Never before has this man done anything violent.

MR. McHALE: Objection. This is not evidence.

THE COURT: Sustained.

MR. SOLOMON: The State, Your Honor, has admitted that he has not been convicted of anything.

THE COURT: No that is not their testimony, sir. That is not his statement.

MR. SOLOMON: The defendant acted under extreme duress or under the substantial domination of another

person - Rocco Surace.

The capacity of the defendant to appreciate the criminality of this conduct to the requirements of the law are substantially impaired.

I couldn't say that. There is no proof of that, and I say to you that any person that would do what he did has to be not in this world.

Prior to the State, three psychiatrists have ruled that he was sane.

MR. McHALE: Objection, Your Honor.

THE COURT: Sustained.

Mr. Solomon you are confined sir, to what has been brought out in the evidence.

MR. SOLOMON: The question arises, then, what thread can you hang it on? What can you give him? Can you give him the fact that he pled guilty to you and seeks mercy?

You can give him the fact that after this two-hour stint, or whatever period of time passed by, it must have dawned on his head, the enormity of what he did, and he started to take care of her with the peroxide and get some water and sugar into her.

MR. McHALE: I object. There is no evidence.

THE COURT: Yes, there is. The testimony is that there was sugar set out for her.

MR. McHALE: Not that this defendant did anything.

THE COURT: Well, it was at their directions. Overruled.

The question that arises, shall we take the man's life,or shall we put him in prison until he's 49 years old? I think if the State desired to put everybody to death, they would say so. 25-year minimum-minimum. However you are right now, whatever age you are add 25 years to it. He will go nowhere. He will be punished.

Now the question is, what shall you do? Is there a thread there upon which to hang any hope for this man, or at least let him live someplace in prison, and I say there is. The fact that he came in here and asked for mercy -- the fact that he came in here and that he went out and he did these things to her to relieve her and to wipe her down and to get her sugar and water, that might be very, very thin to you, but that is a spark, and if there is a spark, there is a place for hope. It may be, at some future

time during this 25-year period of time, if you put him in prison, that the whole system, our state and the rest of these states, will wise up and then say, "Now, we have this man in our custody. Let us see what makes him tick."

Richard Speck -- Richard Speck and six nurses, was it? Life imprisonment.

MR. McHALE: Judge, I object.

THE COURT: Sustained.

MR. SOLOMON: We feel that it is a greater punishment, much greater punishment to see that he spends his life in prison, and there is no hope of ever getting out, at least for 25 years, and we leave it in your hands. Thank you.

[6] Thompson's sentencing hearing occured on September 19-20, 1978. The Supreme Court decided Lockett on July 3, 1978. The Florida Supreme Court issued its opinion on rehearing in Songer on December 21, 1978.

[7] We do not consider whether Thompson would have a valid Ake claim had he made a proper request.

[8] Solomon's failure to request psychiatric assistance with respect to mitigating circumstances was not ineffective assistance of counsel. The Supreme Court's decision in Ake was a